(23)

No. 99-0138

IN THE

**SUPREME COURT OF THE UNITED STATES**

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TROXEL, JENNIFER, et al.
*Petitioner,*
v.
GRANVILLE, TOMMIE
*Respondent.*

---

ON WRIT OF CERTIORARI TO UNITED STATES SUPREME COURT

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# BRIEF OF AMICUS CURIAE OF GRANDPARENTS UNITED FOR CHILDREN'S RIGHTS, INC.

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## *STATEMENT OF THE CASE*

Grandparents United for Children's Rights, Inc. ("Grandparents United"),[1] having obtained consent as

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[1] This *amicus curiae* brief was authored in part by the attorneys named on the cover page on behalf of Grandparents United. Attorney Jason R. Smith assisted in the preparation of this brief. No monetary contributions were provided in exchange for the preparation of this brief.

required by Supreme Court Rule 37, files this *amicus curiae* brief in support of the appellant. Grandparents United urges this Court to recognize the importance of grandparents in the lives of children and the constitutional rights of children to maintain their relationships with important people in their lives. Furthermore, Grandparents United provides information regarding the public policy associated with finding the Washington visitation statute constitutional and allowing visitation when it is found to be in the best interest of the child.

## *QUESTION PRESENTED*

WHETHER THE WASHINGTON SUPREME COURT ERRED IN ITS CONCLUSION THAT STATUTES GRANTING THIRD PARTIES, INCLUDING GRANDPARENTS, A RIGHT TO PETITION FOR VISITATION RIGHTS WITH A MINOR CHILD IF VISITATION IS "IN THE BEST INTEREST OF THE CHILD," IMPERMISSIBLY INTERFERE WITH A PARENT'S FUNDAMENTAL INTEREST IN "CARE, CUSTODY AND COMPANIONSHIP OF A CHILD" WITHOUT CONSIDERATION OF THE CONSTITUTIONAL RIGHTS OF THE CHILD.



## *SUMMARY OF ARGUMENT*

Determination of the constitutionality of visitation statutes must include consideration of the constitutional rights of children. The Washington Supreme Court erred in conducting its constitutional analysis absent recognition of the children's rights to liberty and equal protection in maintaining relationships with their grandparents.

A child's constitutional rights should be examined in light of what is in the child's "best interest." This standard is ascertainable by applying the ABA's recommended factors to best interest hearings involving visitation. The recognition and application of these factors will alleviate the current inconsistency among the States.

Visitation statutes do not impermissibly interfere with a parent's fundamental interest in the care, custody and companionship of a child because the nature of visitation is temporary and subject to future change. In fact, visitation statutes provide a necessary vehicle for representing the rights of children.

Public policy considerations require that "best interest" visitation statutes be upheld as constitutional. The form of the American unitary family has changed. More persons, including grandparents, are involved in raising children today than ever before. Children are developing nurturing relationships with persons other than their biological parents. These children have a constitutional right to due process in maintaining such

relationships when those relationships are in the child's best interest.

## *ARGUMENT*

### I. CHILDREN'S CONSTITUTIONAL RIGHTS TO LIBERTY AND EQUAL PROTECTION REQUIRE THAT THEY CONTINUE RELATIONSHIPS WITH THEIR GRANDPARENTS WHEN IT IS IN THE CHILD'S "BEST INTEREST."

The Washington Supreme Court improperly analyzed the constitutionality of its State's visitation statutes when it considered only the rights of parents and third parties and ignored the rights of the children. Its analysis may have been appropriate had the issue involved the use of a parent's car or an easement on the parent's real estate.[2] Unlike issues involving rights, this case involves children--persons who are "born or naturalized in the United States,..." U.S. CONST. amend. XIV, § 1.

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[2] It is important to note that this analogy refers to the temporary enjoyment of a car or real estate rather than the dominion over them. Likewise, visitation statutes refer only to temporary periods of time during which a child and person close to the child are authorized to spend together after a determination has been made that the visits are in the best interests of that child. Visitation statutes do not involve full care, custody and companionship of a child. Instead, they involve only limited amounts of time with the child after a judicial determination that such visits are in the child's best interest.



### A. *The Washington Supreme Court Overlooked The Constitutional Rights of Children.*

#### 1. Children Have Constitutional Rights That Must Be Considered When Analyzing The Constitutionality Of Visitation Statutes.

The plain language of the Fourteenth Amendment confers Due Process Rights upon "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof...." and protects citizens when a State makes or enforces any law that "deprive[s] any person of life, liberty or property, without due process of law; []or den[ies] to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

The Washington court's decision curtails the liberty of children to maintain relationships with grandparents and other family members. The Fourteenth Amendment prohibits the State from enforcing laws that abridge the privileges of its citizens; it must be applied to all citizens, including children. The Court must protect the child's right to continue associating with third persons, including grandparents, when that association is in the best interest of the child.

This Court has acknowledged equal protection and due process rights for children in many situations. *See DeShaney v. Winnebago Dept. Soc. Serv.*, 489 U.S. 189

(1989) (the Fourteenth Amendment protects children from unwarranted governmental, not family, intrusions on their liberty); *Clark v. Jeter*, 486 U.S. 456 (1988) (illegitimate children have a right to child support); *Martinez v. Bynum*, 461 U.S. 321 (1983) (residence requirement statutes could not be applied in the same manner to children in the custody of their parents as opposed to children who were in college); *Board of Education v. McCluskey*, 458 U.S. 966 (1982) (minor student was entitled to Due Process Rights prior to suspension from school); *Goss v. Lopez*, 419 U.S. 565 (1975) (a child facing temporary suspension from a public school has property and liberty interests under the Due Process Clause); *In re Gault,* 487 U.S. 1 (1967) (a juvenile is entitled to Due Process Rights when in State custody in a delinquency matter). Likewise, a child's right to maintain nurturing relationships, which are in his or her best interest, must receive constitutional protection. It is to view the constitutionality of visitation statutes with blinders if acknowledging only the competing rights of parents and third parties without consideration of the best interest of the child. To do so otherwise equates children with chattel.

2. The State May Act *In Parens Patriae* To Protect The Child's Best Interest.

Children require protection to preserve their emotional and physical well-being. As this Court noted in *Prince v. Massachusetts*, 321 U.S. 158 (1944):



> [T]he family itself is not beyond regulation in the public interest, as against a claim of religious liberty. And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the State as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways ... [T]he State has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and a religious conviction.

*Prince*, 321 U.S. at 166-67 (citations omitted). The Court subsequently balanced the State's ability to require children to attend public schools with a parent's First Amendment right to free exercise of religion, concluding that the state's *parens patriae* power must be balanced against the First Amendment's provision for the free exercise of religion. *See Wisconsin v. Yoder*, 406 U.S. 205, 229-230 (1972). In *Yoder*, the Court concluded that freedom of religion would control unless the physical or mental health of the child would, as a result, be harmed. *See Id.* at 230. Clearly there must be consideration of the child and his or her needs in order to make a determination of the impact on the child should the court fail to intervene.

In the case *sub judice*, the Troxel children will face adverse consequences should their grandparents be precluded from even having standing to raise the issue of whether visitation would be in the children's best interest. Finding Washington's visitation statute unconstitutional would sever the bond between the children and their grandparents, thus resulting in adverse consequences to the

child, without *any* consideration of the constitutional rights of the child. The Court's position in *Prince* allowed a State to restrict parents' absolute control over their children to "guard the general interest in youths' well-being." *Prince*, 321 U.S. at 166. Prevention of the severance of a loving bond between child and grandparent is precisely the "matter[] of conscience" whereby the *Prince* Court authorized a State to act. *Id.* at 167.

### 3. Children's Constitutional Rights to Due Process should be Defined in Terms of Their "Best Interests."

"First, we take the view that the law must make the child's needs paramount...It is in society's best interest." JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 7 (MacMillan Publishing Co., Inc., 1979). The "best interest of the child" standard should guide both courts' and legislatures' recognition of the constitutional rights of children as paramount. Although, at first glance, the best interest of the child standard may seem vague, the standard can be uniformly applied through the examination of several factors to be considered in a judicial determination of the best interests of the child.

The American Bar Association has promulgated a seven part test to determine whether grandparent visitation is in the child's best interest. ABA Commission on Legal Problems of the Elderly, *ABA Policy Resolution and*



*Comments on Grandparent Visitation* (October 2, 1991). Those factors include the following:

> (a) The nature and quality of the relationship between the grandparent and the child, including such factors as whether emotional bonds have been established and whether the grandparent has enhanced or interfered with the parent-child relationship;
>
> (b) whether visitation will promote or disrupt the child's psychological development;
>
> (c) whether visitation will create friction between the child and his or her parent(s);
>
> (d) whether visitation will provide support and stability for the child after a nuclear family disruption;
>
> (e) the capacity of the adults involved for future compromise and cooperation in matters involving the child;
>
> (f) the child's wishes, if the child is able to freely form an expressive preference; and,
>
> (g) any other factor relevant to a fair and just determination regarding visitation.

*Id.* at Lines 23-37. Furthermore, many state courts have required the examination of a child's best interest in determining the constitutionality of grandparent and third party visitation. *See Custody of H.S.H.-K*, 533 N.W.2d 419 (Wis. 1995) (rejecting the biological parent's argument of absolute autonomy in determining who shall visit her child, and employing the court's equitable powers

to grant visitation in the absence of statutory authority, where a parent-like relationship exists); *King v. King*, 828 S.W.2d. 630 (Ky. 1992) (holding that the right to raise children without governmental interference is not inviolate); *Roberts v. Ward*, 493 A.2d 478 (N.H. 1985) (recognizing that the best interest determination primarily protects the right of the child to know his or her grandparents); *In re Sumey*, 621 P.2d 108 (Wash. 1980) (infringement upon a parent's right to care for their child must be balanced against the best interest of the child).

The judicial examination of the best interest factors in every petition for visitation will ensure that the constitutional rights of the child are properly considered. Perpetuating unassailable parental autonomy fails to recognize the existence of constitutional rights in children, equating children with property.

B. *Visitation Statutes Do Not Impermissibly Interfere With A Parent's Fundamental Interest In The Care, Custody And Companionship Of A Child.*

The Washington Supreme Court failed to make an important distinction. The majority relied heavily upon cases that involved full custody of the child or serious interference with the parent's right to free exercise of religion. *Cf. Santosky v. Kramer*, 455 U.S. 745 (1982) (involving an absolute termination of all parental rights); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (restricting a parent's First Amendment right to free exercise of



religion); *Stanley v. Illinois*, 405 U.S. 645 (1972) (attempting the termination of all parental rights of an unwed father without proper notice); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (hindering a parent's right to free exercise of religion). In stark contrast, visitation statutes entail only a temporary and infrequent interference with a parent's care and companionship of the child. The visitation statute does not alter the legal custody rights of the parent.

Further, the constitutional protection granted a parent is not based solely, or even primarily, on the biological link. *Lehr v. Robertson*, 463 U.S. 248, 261 (1983).

> [T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in promot[ing] a way of life' through the instruction of children ... as well as from the fact of blood relationship.

*Id.* (quoting *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 844 (1977) (citation omitted)). "No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of a blood relationship." *Smith*, 431 U.S. at 844. It is this principle upon which the Court must uphold the rights of children and their grandparents and other persons to whom they are bonded, to continue their loving relationships and emotional attachments.

Furthermore, the Washington statute does not guarantee visitation by third parties, including grandparents. Instead, the statute only provides standing for a party to demonstrate that visitation with the child is in the child's best interests.[3] The statute does not automatically grant visitation to a third party; instead, a petitioning party must meet its burden by establishing that visitation is in the child's best interest. To find such a statute unconstitutional would deny due process to the child by abolishing the very forum in which the child's rights can be represented and best interest ascertained.

## II. PUBLIC POLICY CONSIDERATIONS REGARDING CHILDREN'S BEST INTERESTS REQUIRE THAT VISITATION STATUTES BE UPHELD AS CONSTITUTIONAL.

### A. *Family Dynamics Have Changed Over Time Requiring The Existence Of Visitation Statutes.*

Our society has seen many changes, especially in recent years. Changes in the family structure have affected

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[3] In 1996, RCW 26.10.160(3) read as follows:

> Any person may petition the court for visitation rights at any time including, but not limited to, during custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances.



the lives of children, who less and less often live in a "traditional family." As the family changes, so also should the law. These changes in the dynamics of the modern family beg for an iteration of the rights not just of biological parents, but of children and the persons in their lives who are important to them. In recognition of the changes in the family, all the states have adopted statutes allowing visitation, in some form, by grandparents. The Court must not take this important resource away from children, but must uphold their right to continue their relationships with their grandparents.

Society's modern families not longer exist in traditional family units. There were approximately 7 million single-parent families in 1990. U.S. Bureau of the Census, Current Population Survey (1993). In that same year, single-parent families constituted 28% of all families in America. *See id.* Additionally, "[g]randparent-headed households are clearly on the rise, created by teenage pregnancy, incarcerated parents, child abuse, drug and alcohol addiction, death, divorce and illness." ARTHUR KORNHABER, M.D., CONTEMPORARY GRANDPARENTING, 11 (Sage Publications, Inc. 1996). More than 3.2 million children had one or more grandparents residing in their home in 1990 (Census, 1993); since then, that number has nearly doubled, resulting in almost 5.5 million children who lived with a grandparent in the home in 1997. U.S. Bureau of the Census, Current Population Survey (1999). Approximately 7.7% of all children in the United States live with a grandparent in the home. *See id.* This number increased by 40% between 1992 and 1998. *See id.* In addition to the almost one in twelve children who live with a grandparent, there are millions more that have strong,

nurturing relationships with their grandparents even though they do not reside with them.

In addition, the mere change in life expectancy of adults in America is increasing the number of grandparents in our society. The life expectancy in the U.S. in 1900 was only 46. VERN L. BENGSTON AND JOAN F. ROBERTSON, GRANDPARENTHOOD 201 (Sage Publications, Inc. 1985). By comparison, the life expectancy of men in 1985 was over 73 years old, and more than 80 years old for women. *See id.* at 201-02. The trend has continued, resulting in an increase in the number of grandparents. As the statistics demonstrate, grandparents are becoming more involved in raising their grandchildren. This allows for the formation of close familial bonds between children and persons other than their biological parent. These bonds must be preserved.

B. *Children Have A Right To Maintain Relationships With Third Parties, Including Grandparents.*

Family units have changed. The number of children who live with relatives other than biological parents has increased by 16% since 1981. U.S. Bureau of the Census, Current Population Survey (1993). As such, grandparents serve an important role in lives of their grandchildren. "The nurturing role of grandparents is twofold--indirect, by supporting the child's parents, and direct, by caring for the child." VERN L. BENGSTON AND JOAN F. ROBERTSON,



GRANDPARENTHOOD 164 (Sage Publications, Inc. 1985).

The nurturing role of grandparents in raising grandchildren has become more frequent and more direct. This change in the structure of the American family has been accompanied by changes in American law. Common law traditionally afforded no right to visitation for grandparents. However, since 1965, all fifty states have enacted statutes that allow grandparents the right to petition for visitation with their grandchildren. *See* Statement of John H. Pickering, Chair, *ABA Commission on Legal Problems of the Elderly*, (Hearing before Select Committee on Aging, U.S. House of Representatives, October 2, 1991). In fact, Congress enacted legislation last year to protect the visitation rights of grandparents whose grandchildren move to a state which may have a different visitation law. *See* 28 U.S.C. § 1738A(b)(9) (1998).

Despite the existence of such statutes, the law varies tremendously in each state, resulting in courts "beginning to test the efficacy of the various statutes and to define the aspects of grandparent visitation rights not clearly addressed by statute." G. Stevens & G. Sugars, *Legal Overview of Grandparents' Visitation Rights*, Congressional Research Service, Library of Congress (1987). The inconsistency in grandparents' visitation rights between states has left both grandchildren and grandparents in the dark regarding the nature and extent of their rights to form and continue caring relationships with one another.

The incongruence among grandparent visitation laws requires uniformity. This Court should acknowledge

not just the rights of biological parents, but of both the children and grandparents who have developed strong, loving relationships. Moreover, it is a deprivation of due process rights to allow parents arbitrarily to sever the familial bonds between grandchild and grandparent without even so much as a hearing to determine what is in that child's best interest. As the Indiana Court Appeals prudently remarked: "There is no reason that a petty dispute between a father and son should be allowed to deprive a grandparent of the unique relationship that ordinarily exists between those individuals." *Sightes v. Barker*, 684 N.E.2d 224, 231 (Ind. App. 1997). Washington's statute would not allow this undesirable result.

The visitation statute at issue promotes a child's right to continue nurturing relationships (should the child be fortunate enough to have such relationships) with individuals that have been instrumental in the development of that child. The "best interest" hearing serves to balance the rights of the parent with the rights of the child and petitioning third party. The statute does not impermissibly interfere with the parent's right to autonomy in raising his or her child. The statute does not create a right to visitation; rather, it creates a right *to petition* the court for visitation. Pursuant to Washington's statute, it is only after the child's rights are examined in such a hearing, and a best interests finding is made, that an order for visitation could be issued. Furthermore, an order for visitation is not a final order. Such orders are subject to future modification or revision in accordance with the best interest of the child. Thus, the temporary and flexible effects of Washington's visitation statute do not



impermissibly interfere with a parent's fundamental right to autonomy in child-rearing decisions.

## *CONCLUSION*

For the reasons stated above, Grandparents United respectfully requests that this Court reverse the decision of the Washington Supreme Court and find RCW 26.10.160(3) constitutional. Furthermore, Grandparents United urges this Court to recognize and iterate the constitutional rights of minor children in maintaining beneficial relationships, through visitation with their grandparents and other caregivers, when such visitation is in the best interest of the child.

Respectfully Submitted,

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